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of Glasgow

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Prosecutor v. Dragan Nikolić: Decision on Defence Motion on Illegal Capture

JAMES SLOAN*

Abstract

In November 1994 the International Criminal Tribunal for the former Yugoslavia (ICTY), indicted its first accused, Dragan Nikolić. It was not until over five years later, however, in April 2000, that he was finally arrested and transferred to The Hague. The circumstances of his arrest – which reportedly featured his being violently abducted from his home in the Federal Republic of Yugoslavia (FRY) by Serbian criminals before being transferred to the NATO-led Stabilization Force in Bosnia and Herzegovina and, ultimately, to the ICTY in The Hague – were the subject of a pre-trial motion. Nikolić's defence counsel asserted that the nature of his capture was such that the appropriate remedy was to dismiss the charges against him and order his return to the FRY. They made this assertion despite an admission, for the purposes of the motion, that the captors lacked any connection with SFOR or the ICTY. The trial chamber rejected the motion. In reaching its decision, the trial chamber considered fundamental issues about what constituted an illegal capture for the purposes of the ICTY and, without explicitly doing so, appeared to reject the view of the Court in *Eichmann* that a person may not oppose his being tried by reason of the illegality of his capture.

Key words

arrest; ICTY; illegal capture; *male captus, bene detentus*; *male captus, male detentus*; NATO; SFOR

I. INTRODUCTION

On the evening of 21 April 2000, the alleged war criminal Dragan Nikolić was illegally¹ abducted in the Federal Republic of Yugoslavia (FRY) by unknown captors, smuggled across the Drina River and into Bosnia and Herzegovina and then handed over to what is reported to have been a US contingent² of the NATO-led Stabilization

* Lecturer in Public International Law at the University of Glasgow School of Law. The author is grateful to Catriona Drew for providing extremely helpful comments on an earlier draft.

1. It is agreed by the parties to the Motion under discussion that Nikolić's abductors were 'convicted of offences (presumably under FRY law) in relation to the accused's transfer to Bosnia-Herzegovina by the district court in Smederevo, FRY'. (See Prosecutor's Response to 'Defence Motion Based Inter Alia Upon Illegality of Arrest Following Upon the Prior Unlawful Kidnapping and Imprisonment of the Accused and Co-related Abuse of Process Within the Contemplation of Discretionary Jurisdictional Relief Under Rule 72' filed 17 May 2001, 31 May 2001 (hereafter, Prosecutor's Reply of 31 May 2001, at para. 5.) The question of whether his capture was illegal in *international law* was, in part, the subject of the Decision under discussion herein.
2. Z. Cvijanovic and V. Zimonjic, 'Belgrade Crackdown: Bounty hunters strike inside Serbia to seize war crimes suspects', *Independent*, 18 May 2000, 14.

Force (SFOR).³ He was immediately transferred by SFOR to the International Criminal Tribunal for the former Yugoslavia (ICTY)⁴ in The Hague, where he pleaded not guilty to all charges against him.⁵ As the Indictment against him currently stands,⁶ he is charged with eight counts of crimes against humanity, alleged to have been committed during 1992, largely in his capacity as commander of the Susica detention camp in eastern Bosnia and Herzegovina. Nikolić, the ICTY's first indictee, had been at large since his Indictment was confirmed in November 1994.⁷

This note considers a Decision of 9 October 2002,⁸ in which Trial Chamber II of the ICTY rejected two defence motions challenging the trial chamber's jurisdiction over Nikolić in view of the nature of his capture⁹ and calling for the dismissal of the Indictment against him and his release and return to the FRY.¹⁰

The effect of an accused's irregular capture on the jurisdiction of the ICTY is not a new issue; it has arisen twice before without conclusive result. In the first such case, *Prosecutor v. Mile Mrksić et al.*,¹¹ the accused Slavko Dokmanović sought his release based on the fact that he was lured by the Tribunal's Office of the Prosecutor (OTP)¹² from the FRY into UN-administered Croatia, where he was arrested.¹³ Because the trial chamber rejected Dokmanović's claim that his arrest was in violation of international law, it ruled that it did not have to 'decide ... whether the International

3. SFOR is the successor to the NATO-led Implementation Force in Bosnia (IFOR). 'IFOR (now SFOR) was established by NATO in December 1995 pursuant to the Dayton Peace Agreement and under the authority of the United Nations Security Council'. See *Prosecutor v. Blagoje Simić, Milan Simić, Miroslav Tadić, Stevan Todorović and Simo Zarić*, Decision on Motion for Judicial Assistance to be Provided by SFOR and Others, Case No. IT-95-9-PT, T. Ch., 18 Oct. 2000 (hereafter Decision on Todorović Motion for Judicial Assistance of 18 Oct. 2000, at para 39).

4. Also referred to as 'the Tribunal' or 'the International Tribunal'.

5. At his initial appearance on 28 April 2000.

6. Nikolić was initially indicted for 24 counts of crimes against humanity, violations of the laws or customs of war and grave breaches of the Geneva Conventions (see *Prosecutor v. Dragan Nikolić a/k/a/ Jenki*, Case No. IT-94-2-I, Indictment, 1 Nov. 1994). This indictment was confirmed by a trial chamber on 20 October 1995, with the result that an international arrest warrant was issued and transferred to all states. See Review of the Indictment Pursuant to Rule 61 of the Rules of Procedure and Evidence, 20 October 1995, as discussed in *Prosecutor v. Dragan Nikolić*, Decision on Defence Motion Challenging the Exercise of Jurisdiction by the Tribunal, Case No. IT-94-2-PT, T.Ch. II, 9 Oct. 2002 (hereafter, Decision of 9 Oct. 2002), at para. 12. The indictment has been twice amended, most recently on 7 Jan. 2002.

7. Initially he was residing in the Bosnian Serbian held part of Bosnia and Herzegovina, where the authorities did not recognize the Tribunal. By February 1999, when an Amended Indictment was confirmed, Nikolić had apparently relocated to the FRY. See *ibid.*, at paras. 13 and 14.

8. *Ibid.*

9. The initial motion, Motion for Relief Based Inter Alia Upon Illegality of Arrest Following Upon the Prior Unlawful Kidnapping and Imprisonment of the Accused and Co-related Abuse of Process Within the Contemplation of Discretionary Jurisdictional Relief Under Rule 72, 17 May 2001 (hereafter Defendant's Motion of 17 May 2001), was supplemented and modified by a second motion, Motion to Determine Issues as Agreed Between the Parties and the Trial Chamber as Being Fundamental to the Resolution of the Accused's Status Before the Tribunal in Respect of the Jurisdiction of the Tribunal under Rule 72 and Generally, the Nature of the Relationship Between the OTP and SFOR and the Consequences of any Illegal Conduct Material to the Accused, His Arrest and Subsequent Detention, 29 Oct. 2001 (hereafter Defendant's Motion of 29 Oct. 2001).

10. See Defendant's Motion of 17 May 2001, *ibid.*, at para. 1.

11. *Prosecutor v. Mile Mrksić, Miroslav Radić, Veselin Šljivančanin and Slavko Dokmanović*, Case No. IT-95-13a-PT.

12. Also referred to as 'the prosecutor' or the 'prosecution'.

13. His arrest was effected by means of a 'sting' operation carried out jointly by the OTP and the United Nations Transitional Administration for Eastern Slavonia, Baranja and Western Imrimium (UNTEAS).

Tribunal has the authority to exercise jurisdiction over a defendant *illegally* obtained from abroad'.¹⁴

In the second case, *Prosecutor v. Blagoje Simić et al.*,¹⁵ the alleged facts surrounding the arrest of one of the accused, Stevan Todorović, were strikingly similar to those alleged by Nikolić. Todorović claimed he had been captured in the middle of the night by armed, masked men who gagged, blindfolded, and beat him with a baseball bat¹⁶ and then proceeded to smuggle him out of the FRY and into Bosnia and Herzegovina¹⁷ – and into the waiting arms of SFOR.¹⁸ Through a complicated series of motions,¹⁹ Todorović obtained a decision ordering SFOR and the NATO states participating in SFOR to disclose to him information relating to the circumstances of his capture. This caused serious concern among the participating states,²⁰ which claimed that the ordered disclosure would compromise the confidentiality of NATO's operational methods. Ultimately, the OTP withdrew all but one of the 27 charges against Todorović; in return, Todorović pleaded guilty to the single remaining charge and agreed not to pursue the ordered disclosure.

In the two previous cases, therefore, the trial chamber was not required to consider the difficult issue of whether the nature of an accused's capture affected the ICTY's jurisdiction. In the light of this, and given the importance of such a ruling to the other indictees who have been brought before the ICTY through similar irregular methods,²¹ it was with some anticipation that the trial chamber's decision on the *Nikolić* Motion was awaited.

2. THE AGREED FACTS AND ISSUES

In the *Todorović* matter, the defence strategy appeared to be twofold: to bring a seemingly endless stream of motions and to attempt to gain access to sensitive and potentially embarrassing information held by SFOR regarding its possible involvement in his capture. Although the approach appeared to cause the OTP

14. Emphasis in original. See *Prosecutor v. Mile Mrksić et al.*, Decision on the Motion for Release by the Accused Slavko Dokmanović, Case No. IT-95-13a-PT, T. Ch., 22 Oct. 1997, at para. 78.
15. See Decision on Todorović Motion for Judicial Assistance of 18 Oct. 2000, *supra* note 3. The issues raised in this case are considered in greater detail in J. Sloan, 'Prosecutor v. Todorović: Illegal Capture as an Obstacle to the Exercise of International Criminal Jurisdiction', (2003) 16 LJIL 85–113.
16. At his initial appearance before the ICTY on 30 Sept. 1998 he advised the trial chamber that he 'did not feel well because he had received a heavy blow with a baseball bat over his head "during the kidnapping"'. See Prosecution Response to the Appeal Brief of the Accused/Appellant Stevan Todorović, filed 4 Aug. 1999, at para. 9, n. 8.
17. See S. Castle, 'Bosnian Police Chief May Escape War Crimes Trial', *Independent*, 16 Aug. 2000, 11. See also T. Walker, 'SAS Carried Out Serbian Raid', *The Times*, 11 Nov. 1998, 15.
18. SFOR then transferred the accused immediately to the ICTY in The Hague.
19. For a discussion of the nature of Todorović's motions and the issues raised therein, see Sloan, *supra* note 15, at 88–93.
20. On 2 Nov. 2000, a series of communications was received by the ICTY from NATO and several of its member states calling for a review of the decision ordering disclosure and for its stay. (See *Prosecutor v. Blagoje Simić, Milan Simić, Miroslav Tadić, Stevan Todorović and Simo Zarić*, Decision and Scheduling Order, Case No. IT-95-9-PT, A. Ch., 8 Nov. 2000.)
21. For a list of accused who have been brought before the ICTY through the intervention of SFOR, see S. Lamb, 'The Powers of Arrest of the International Criminal Tribunal for the Former Yugoslavia', (1999) 70 BYIL 167, at 167, n. 3.

considerable frustration,²² it did lead to some measure of success for Todorović in that all but one of the charges against him were ultimately dropped.²³ In contrast, defence counsel for Nikolić were a model of co-operation in their dealings with the OTP. Indeed it was they who proposed²⁴ that certain factual assumptions be agreed upon by the parties²⁵ for the purposes of the Motion,²⁶ rather than attempting to obtain disclosure from SFOR.²⁷ The approach of Nikolić's counsel, which (at least initially) avoided a *Todorović*-style evidentiary hearing,²⁸ was welcomed by the OTP,²⁹ which had unsuccessfully called for such an arrangement in the *Todorović* matter.

In addition, the parties to the Motion reached agreement on the legal issues to be determined in the Motion. They were as follows:

- 1 If it can be established by the accused that the accused's arrest was achieved by any illegal conduct committed by, or with the material complicity of: (a) any individual or organization (other than SFOR, OTP or the Tribunal); (b) SFOR; (c) OTP; or (d) the Tribunal, would the accused be entitled to the relief sought?
- 2 Does SFOR act as an agent of the OTP and/or the Tribunal in the detention and arrest of suspected persons?³⁰

22. The OTP described the motions brought by Todorović as 'many and various' and the litigation itself as 'long and tortuous'. See Prosecutor's Response to Stevan Todorović's 'Notice of Motion for Judicial Assistance', filed 8 Dec. 1999, at para. 11.

23. Note, however, that OTP officials took the position that 'absolutely nothing had been sacrificed' in that case. Cf. J. Cogan, 'International Criminal Courts and Fair Trials: Difficulties and Prospects', (2002) 27 Yale J. Int'l L. 111, at 127, where he noted the 'rather [unconvincing] nature of this assertion by the OTP.

24. See Defendant's Motion of 17 May 2001, *supra* note 9, at para. 3.

25. See Decision of 9 Oct. 2002, *supra* note 6, at para. 21, where the trial chamber noted the following agreed facts:

- that the Accused at the time of his apprehension was living in the Federal Republic of Yugoslavia; that the Accused was taken forcibly and against his will and transported into the territory of Bosnia and Herzegovina;
- that the apprehension and transportation into the territory of Bosnia and Herzegovina was undertaken by unknown individuals having no connection with SFOR and/or the Tribunal;
- that the accused in his interview with the prosecution asserted that he was handcuffed and in the boot of a car, when the unknown individuals handed him over to SFOR;
- that in Bosnia and Herzegovina the accused was arrested and detained by SFOR;
- that subsequently the accused was delivered into the custody of the Tribunal and transferred to The Hague; and
- that certain individuals have been tried and sentenced in the Federal Republic of Yugoslavia for the acts relating to the apprehension of the Accused.

26. This proposal appears to have been in response to the suggestion of a pre-trial judge at a 30 March 2001 Status Conference. See Decision of 9 Oct. 2002, *ibid.*, at para. 5. As noted by counsel for Nikolić, one of the objectives of proceeding in the way they did was 'to avoid the quagmire of enquiry, allegation and counter-allegation that typified the approach of the parties in *Todorović*'. (See 'Notice of Appeal from the Judgement, pursuant to Rule 108 of the Rules of Evidence and Procedure, of Trial Chamber II dated the 9th day of Oct. 2002 concerning the Defence Motion Challenging the Exercise of Jurisdiction by the Tribunal, filed by the Defendant on 7 November 2002' (hereafter Defendant's Notice of Appeal of 9 Oct. 2002), at para. 3).

27. This position was taken by the defence 'on a without prejudice basis with regard to any future position it may decide to adopt on the question of disclosure'. (See Prosecutor's Reply of 31 May 2001, *supra* note 12, at para. 10, n. 9 and Decision of 9 Oct. 2002, *supra* note 6, at para. 6.).

28. A *Todorović*-style hearing was, in the view of the OTP, to be avoided as it 'may impinge upon the vital national security interests of third States and/or multinational forces in the field'. *Ibid.*, at paras. 10 and 11.

29. *Ibid.*, at para. 11. The approach was presumably welcomed by SFOR and its member states as well, as it allowed them, at least initially, to remain outside the picture (where they very much wanted to be in the *Todorović* case).

30. See Decision of 9 Oct. 2002, *supra* note 6, at para. 18, and Defendant's Motion of 29 Oct. 2001, *supra* note 9, at para. 1.

3. THE DECISION

The trial chamber divided its reasoning into two parts. First, it considered whether the conduct of the alleged kidnappers could be attributed to SFOR or the OTP. It then turned to the question of whether there was a legal impediment to its exercise of jurisdiction stemming from 'the fact that the Accused was brought into the jurisdiction of the Tribunal by SFOR and the Prosecution after his alleged illegal arrest in the territory of the FRY and transfer to the territory of Bosnia and Herzegovina by some unknown individuals.'³¹

3.1. Adoption, attribution, and agency

The concession by the defence that, for the purposes of the Motion, there was no connection between Nikolić's capture and SFOR or the Tribunal made its attempt to attribute the conduct of his captors to the ICTY or SFOR difficult indeed. Nevertheless, the defence attempted to link the irregular nature of the capture to the Tribunal in two ways. First, it argued that 'by not only ignoring the illegality but, by actively taking advantage of the situation and taking into custody the accused, SFOR's exercise of jurisdiction over Nikolić was an adoption of the illegality – of which they were aware – and thus, an extension of the unlawful detention'.³² Second, the defence argued that this allegedly illegal conduct on the part of SFOR should be attached to the Tribunal, based either on SFOR's status as 'both the *de facto* and *de jure* agent of the Prosecution'³³ or, alternatively, on the OTP having ratified SFOR's conduct.³⁴

Both arguments were unsuccessful. First, the trial chamber rejected the defence argument that the captors' allegedly illegal acts could be attributed to SFOR. In this regard it relied on Article 11 of the International Law Commission's 2001 *Articles on State Responsibility*,³⁵ which speaks of conduct 'that the State acknowledges and adopts . . . as its own'.³⁶ In finding that SFOR did not acknowledge and adopt the conduct,³⁷ the trial chamber stressed the fact that when an accused came 'into contact with' SFOR,³⁸ it was obliged to detain and transfer the accused to the Tribunal under

31. See Decision of 9 Oct. 2002, *supra* note 6, at para. 73.

32. *Ibid.*, at para. 32, quoting from Defendant's Motion of 29 Oct. 2001, *supra* note 9, at para. 12.

33. See Decision of 9 Oct. 2002, *supra* note 6, at para. 32, relying on Defendant's Motion of 29 October 2001, *supra* note 9, at paras. 7–11.

34. See Defendant's Motion of 29 Oct. 2001, *supra* note 9, at para. 10: 'the subsequent conduct of the OTP and/or Tribunal was such that the conduct of SFOR was in effect ratified and made as if it had been previously authorized'.

35. Articles on the Responsibility of States for Internationally Wrongful Acts, UN Doc. A/CN.4/L.602/Rev.1 (2001).

36. *Ibid.*, at Article 11, referred to in the Decision of 9 Oct. 2002, *supra* note 6, at para. 60 *et seq.*

37. Decision of 9 Oct. 2002, *supra* note 6, at para. 67.

38. This test triggered SFOR's legal authority to detain an accused (*ibid.*, at para. 54). See also *ibid.*, at para. 52, where the trial chamber discussed the Rules of Engagement adopted by the North Atlantic Council (NAC) on 16 Dec. 1995, which provide that SFOR 'should detain any persons indicted by the International Criminal Tribunal who come into contact with SFOR/IFOR in its execution of assigned tasks'. See also the trial chamber's discussion of the legal framework governing the activities of SFOR, *ibid.*, at paras. 35–47.

the Tribunal's Statute³⁹ and Rules.⁴⁰ The trial chamber concluded that through its conduct, 'SFOR did nothing but implement its obligations under the Statute and the Rules of this Tribunal'.⁴¹ As to the second aspect of the defence's argument – that SFOR's 'illegal' conduct could be attributed to the OTP through agency or the OTP's ratification of SFOR's acts – the trial chamber held that this was moot in the light of its finding that the illegal conduct of Nikolić's captors could not be attributed to SFOR, 'for lack of acknowledgement and ratification'.⁴²

3.2. The trial chamber's jurisdiction over the accused: issues of *male captus*

It is well known that two, alternate approaches have been followed by state courts when dealing with accused brought before them by means of illegal inter-state capture. By one approach, which may be summarized by the maxim *male captus, male detentus*,⁴³ the national court would refuse jurisdiction where the circumstances of the accused's capture were sufficiently irregular. Among the reasons given by these national courts for refusing jurisdiction in such circumstances have been the following:

- (i) the rule of law;⁴⁴
- (ii) the integrity of the executive branch (it must not be rewarded for illegal behaviour);⁴⁵
- (iii) the integrity of the judicial branch;⁴⁶

39. Art. 29 (2)(d) of the Statute, which provides that states have an obligation 'to arrest and detain persons', has been held to apply to SFOR as well (see Decision of 9 Oct. 2002, *supra* note 6, at para. 49, relying on the Decision in Todorović Motion for Judicial Assistance of 18 Oct. 2000, *supra* note 6, at 18–19).

40. Rule 59 *bis* (A) of the Tribunal's Rules of Procedure and Evidence speaks of 'an order for the prompt transfer of the accused to the Tribunal in the event that the accused be taken into custody by that authority or international body . . .'. (See the ICTY's Rules of Procedure and Evidence, as quoted in the Decision of 9 Oct. 2002, *supra* note 6, at para. 55).

41. See Decision of 9 Oct. 2002, *supra* note 6, at para. 67.

42. *Ibid.*, at para. 68. As noted by the trial chamber, 'Whatever the relationship between SFOR and the Prosecution, no attribution to the Prosecution can take place' (*ibid.*, at para. 69).

43. 'In the view of the Defence, this Tribunal should apply the principle of *male captus, male detentus*, meaning that an irregularity has occurred in the arrest of the Accused and therefore should bar any further exercise of jurisdiction by the Tribunal' (*ibid.*, at para. 70).

44. See *R. v. Horseferry Road Magistrates' Court, Ex parte Bennett*, [1994] 1 AC 42 (House of Lords), as quoted in *ibid.*, at para. 87, where Lord Bridge of Harwich noted, at 67, that there is

no principle more basic to any proper system of law than the maintenance of the rule of law itself. When it is shown that the law enforcement agency responsible for bringing a prosecution has only been enabled to do so by participation in violations of international law and of the laws of another state in order to secure the presence of the accused within the territorial jurisdiction of the court, I think that respect for the rule of law demands that the court take cognisance of that circumstance.

45. See *R. v. Hartley* (New Zealand, Court of Appeal), [1978] 2 NZLR 199, as quoted in Decision of 9 Oct. 2002, *supra* note 6, at para. 88, where the court, at 216, spoke of not 'turning a blind eye to action of the New Zealand police', which it considered to be an abuse of power. See also *State v. Ebrahim*, 95 ILR 417, [Judgement of 26 Feb. 1991 of the South Africa, Supreme Court (Appellate Division)], as quoted in Decision of 9 Oct. 2002, *supra* note 6, at para. 90, where the court noted, at p. 442, that when 'the State is itself party to a dispute, as for example in criminal cases, it must come to court "with clean hands" as it were'. See also the Zimbabwe case of *State v. Beahan*, 1992(1) SACR 307 (A), as quoted in Decision of 9 October 2002, *supra* note 6, at para. 93, where, at 317, the court cautioned against 'encouraging States to become law-breakers in order to secure the conviction of a private individual'.

46. See *Beahan*, *supra* note 45, as quoted in Decision of 9 Oct. 2002, *supra* note 6, at para. 93, where the court, at 317, noted that 'in order to promote confidence in and respect for the administration of justice and preserve

- (iv) the fairness of the legal process;⁴⁷ and
- (v) respect for state sovereignty.⁴⁸

Under the second approach, which may be summarized by the maxim *male captus, bene detentus*, the ‘court may exercise jurisdiction over an accused person regardless of how that person has come into the jurisdiction of that court’.⁴⁹ This latter approach is perhaps best illustrated by the *Eichmann* case⁵⁰ before the Israeli courts, where it was held that, despite Eichmann’s arrest in contravention of Argentinean and international law, he could be legally tried. In the words of the Court, ‘It is an established rule of law that a person being tried for an offence against the laws of a state may not oppose his trial by reason of the illegality of his arrest or the means whereby he was brought within the jurisdiction of that State.’⁵¹

Counsel for Nikolić argued that the *male captus, bene detentus* approach had lost much of its relevance and should no longer be applied.⁵² They further alleged that because the forcible removal of Nikolić from the FRY resulted in the serious breach of international law, even absent the involvement of SFOR or the Prosecution, Nikolić’s release and the dismissal of the indictment against him were the only appropriate remedies. For its part, the OTP did not exactly champion the *male captus, bene detentus* approach: it merely argued that national precedents ‘do not present a consistent picture of the validity, or not, of the maxim ...’.⁵³ Instead, its approach was to argue that even if the *male captus, male detentus* approach was favoured in national law, it was inapplicable in Nikolić’s case because his capture did not violate international law.⁵⁴

While not explicitly endorsing the *male captus, male detentus* approach over that of *male captus, bene detentus*, the trial chamber did appear to disapprove of the latter

the judicial process from contamination, a court should decline to compel an accused person to undergo trial in circumstances where his appearance before it has been facilitated by an act of abduction undertaken by the prosecuting State’.

- 47. See *Ebrahim*, *supra* note 45, where the court noted, at 442, that ‘the legal process must be fair towards those affected by it ...’ (quoted in the Decision of 9 October 2002, *supra* note 6, at para. 90).
- 48. See *Ebrahim*, *supra* note 45, where the court noted at 442 that ‘international legal sovereignty must be respected’ (quoted in the Decision of 9 October 2002, *supra* note 6, at para. 90). See also *Beahan*, *supra* note 45, where the court noted, at 317, that illegal interstate capture ‘corrodes the peaceful coexistence and mutual respect of sovereign nations’ (quoted in the Decision of 9 October 2002, *supra* note 6, at para. 93).
- 49. See Decision of 9 October 2002, *supra* note 6, at para. 70.
- 50. *The Attorney-General of the Government of Israel v. Eichmann*, (1961) 36 ILR 18 (District Court of Israel) and (1962) 36 ILR 304 (Supreme Court of Israel).
- 51. *Ibid.*, District Court at 59.
- 52. The *male captus, bene detentus* approach finds only limited favour in national law, with the United States being one of its main adherents. The best known – and most controversial – United States case of recent times was that of *United States v. Alvarez-Machain*, United States Supreme Court, 504 U.S. 655 (1992). There, Humberto Alvarez-Machain, a Mexican national, was abducted from Mexico by US officials and taken forcibly to the United States to stand trial for kidnapping and murder. His abduction took place without the permission of the Mexican government and without regard to the existence of an extradition treaty. For a discussion of the widespread condemnation of this case both in the United States and internationally, see M. Scharf, ‘The Tools for Enforcing International Criminal Justice in the New Millennium: Lessons from the Yugoslavia Tribunal’, (2000) 49 DePaul L. Rev. 925. See also C. Biblowit, ‘Transborder Abductions and United States Policy: Comments on *United States v. Alvarez Machain*’, (1996) 9 N.Y. Int’l L. Rev. 105, at 107.
- 53. See Decision of 9 Oct. 2002, *supra* note 6, at para. 72.
- 54. A further argument by the OTP, that even if the accused’s apprehension *did* violate international law, the remedy sought was inappropriate and did not need to be considered by the trial chamber in view of its finding that there was no violation of international law, discussed below.

approach given its clear willingness to look into the nature of the accused's capture. Moreover, it specifically applied aspects of some of the national decisions which followed the *male captus, male detentus* approach.⁵⁵ As we shall now see, the trial chamber considered the bases on which Nikolić claimed it should refuse jurisdiction – (i) breach of the FRY's state sovereignty; (ii) breach of Nikolić's international human rights; and (iii) breach of the rule of law/abuse of process⁵⁶ – and concluded that no such violations had occurred or, if they had occurred, none was sufficiently grave to lead to its refusal to exercise jurisdiction. In considering each alleged irregularity, the trial chamber placed great emphasis on the agreed position of the parties that there was no connection between the illegal capture and the OTP or SFOR.

3.2.1. *Alleged violation of the sovereignty of the Federal Republic of Yugoslavia*

On the question of the effect of the capture on the FRY's sovereignty, the defence conceded that where there was no direct complicity by the forum state in the abduction (and the abduction instead involved the actions of private individuals) the law was unsettled as regards the remedy the defence was seeking.⁵⁷ It therefore focused its energies on drawing a link between the conduct of the private individuals who undertook Nikolić's abduction and the OTP by asserting that the OTP had subsequently ratified the conduct.⁵⁸ It relied on the view of one commentator who argued that even if the actions of the captors were not authorized by the state '*ab initio*, it is the State that acts as soon as it fails to return the abducted person, but arrests and prosecutes him and thus ratifies the originally unauthorized acts'.⁵⁹ This line of reasoning, which had strong echoes of the attributability argument made and dismissed earlier,⁶⁰ was not addressed by the trial chamber. Instead the trial chamber – perhaps conflating matters – focused on the question of whether there was involvement on the part of SFOR or the OTP in the abduction and, again relying on the defence admission on this point, concluded that there was not.⁶¹ Based on this finding, and on its conclusion that the involvement of the executive authorities of the forum state in the capture was a *sine qua non* of the decisions of the national

55. For example, it relied on the South African case of *Ebrahim*, *supra* note 45, at 442, for the proposition that the OTP must come to before the trial chamber with 'clean hands'. See Decision of 9 October 2002, *supra* note 6, at para. 111.

56. See Defendant's Motion of 29 Oct. 2001, *supra* note 9, at para. 14.

57. *Ibid.*, para. 15.

58. The defence argued that 'although the abduction of an individual by private persons may not initially involve state responsibility, it is submitted that any subsequent ratification of the illegal act does establish state responsibility' (*ibid.*).

59. See F. A. Mann, 'Reflection on Prosecution of Persons Abducted in Breach of International Law', in Y. Dinstein (ed.), *International Law at a Time of Perplexity* (1989), 405 at 408, as quoted in the Defendant's Motion of 29 Oct. 2001, *supra* note 9, at para. 15, n. 24. Mann further noted:

Even if the person acting in the foreign territory is not a police officer but a private one, subsequent adoption by the State entails its responsibility. For this reason the suggestion that the infamous Eichmann was abducted by private volunteers is irrelevant in law, for even if it had been factually correct ... the essential fact is that Eichmann was imprisoned, prosecuted, convicted and executed by the State of Israel which thus endorsed the acts of any private persons involved.

60. See *supra* notes 35–41, and accompanying text.

61. Indeed, the trial chamber went so far as to infer, based on the assumed facts, 'that there are no *indicia* that SFOR or the Prosecution offered any incentives to [Nikolić's captors]'. (See Decision of 9 Oct. 2002, *supra* note 6, at para. 101.)

courts to refuse to exercise jurisdiction,⁶² the trial chamber concluded that there had been no breach of the FRY's sovereignty.

A second reason given by the trial chamber for finding that the FRY's sovereignty had not been breached was that, unlike in the national case law referred to, in the case at bar there was no violation of an extradition treaty. This point is not clearly elaborated. Although it is true that there was no need for an extradition treaty between the FRY and the ICTY given the obligation on all member states of the United Nations to surrender indicted persons to the ICTY, it is not clear what bearing this observation might have on the discussion – unless the trial chamber takes the view that an extradition treaty was an essential element in cases where the national courts refused jurisdiction. The national case law does not, however, bear this out.⁶³ Moreover, to place such importance on the existence of an extradition treaty risks the implication by the trial chamber that absent such a treaty, the participation of the forum state in an illegal interstate capture does not breach international law.⁶⁴

A final reason why the trial chamber found no breach of the FRY's sovereignty was the different considerations at play in the relationship between two states on the one hand, and between the Tribunal and a state on the other.⁶⁵ In the former situation it held, 'it is of the utmost importance that any exercise of such national jurisdiction be ... in full respect of other national jurisdictions';⁶⁶ whereas in the latter, different considerations apply. 'The role of the Tribunal, as an enforcement measure under Chapter VII of the UN Charter, is ... fundamentally different. Consequently, in this vertical context, sovereignty by definition cannot play the same role.'⁶⁷ While it is, of course, true that different considerations must apply as regards relations between the Tribunal and member states of the UN (clearly the Tribunal could not function if its relations with states were constrained in the same manner as between states), it is submitted that there must nevertheless be *some* limits on the ICTY's power to intervene in a state.⁶⁸ Indeed the Decision would have benefited from consideration

62. *Ibid.*, at paras. 101–102. Somewhat disconcertingly, the trial chamber relied on a passage from an article written by a member of the prosecution staff as being authoritative support for its assertion in this regard. This does little to further an impression of impartiality on the part of the trial chamber.

63. The most that may be said is that the violation of an extradition treaty violation *may* be a factor in the decisions of national courts (see *supra* notes 44–48). In the influential case of *Bennett*, *supra* note 44, Lord Griffiths, at 62, was deliberately silent on the question of whether he would have refused jurisdiction in the absence of an extradition treaty.

64. Without regard to the broader obligations on states under the UN Charter and customary international law to respect the principles of state sovereignty and non-intervention (see, for example, *Case Concerning the Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Merits, Judgement of 27 June 1986, [1986] ICJ Rep. 14).

65. See Decision of 9 Oct. 2002, *supra* note 6, at para. 100.

66. *Ibid.*

67. *Ibid.* In *obiter dictum* on this point, the chamber noted that even if it had found there to be a violation of state sovereignty 'the Accused should first have been returned to the FRY, whereupon the FRY would have been immediately under the obligation of Article 29 of the Statute to surrender the Accused to the Tribunal'. *Ibid.*, at para. 104. The significance of this observation is not clear. Of course the FRY would be obliged in such a case immediately to surrender the accused – just as it had been so obliged since the arrest warrant was sent to it in 1999. What Nikolić appeared to be hoping, however, was that it would, once again, ignore this obligation.

68. One such limit might, for example, be that any interference in a state's sovereignty must be *specifically* provided for in the Statute of the ICTY.

of whether there are such limits on the ICTY, and, if so, what they are and whether Nikolić's capture in violation of the law of the FRY violated them.

3.2.2. *Alleged violation of human rights and the rule of law/due process*⁶⁹

The trial chamber considered Nikolić's allegations of violations of his fair trial rights and of the rule of law/due process together.⁷⁰ As regards the former, the defence invoked Nikolić's right not to be deprived of his liberty other than in accordance with a procedure established by law,⁷¹ and relied in this regard upon several decisions of the UN Human Rights Committee.⁷² The trial chamber, however, rejected the approach under the international treaties, once again based on the concession of the defence that there was no connection between the capture and the OTP or the SFOR. As noted by the trial chamber, in all the cases referred to by the defence, 'the States against which the applications were lodged were themselves involved in the forced abductions of the victims'.⁷³

The defence further argued that Nikolić's rights had been violated *notwithstanding* the absence of a role of either the OTP or SFOR,⁷⁴ and relied in this regard on the *Barayagwiza* case from the International Criminal Tribunal for Rwanda.⁷⁵ Here the Appeals Chamber held that a trial chamber had the discretion to decline to exercise its jurisdiction in cases where 'serious and egregious violations of the accused's right would prove detrimental to the court's integrity'⁷⁶ regardless of 'which entity or entities were responsible for the alleged violations of the Appellant's rights'.⁷⁷ The trial chamber in *Nikolić* referred to this decision, noting that even without any involvement by SFOR or the OTP it would be 'extremely difficult to justify the exercise of jurisdiction over a person if that person was brought into the jurisdiction of the Tribunal after having been seriously mistreated'.⁷⁸ Nevertheless, it found that

69. See Defendant's Motion of 29 Oct. 2001, *supra* note 9, at para. 17, where the defence noted: 'It is submitted that while an abduction is *per se* both an abuse of process and a breach of the rule of law the subsequent transfer of a defendant as a direct consequence of an abduction into a different jurisdiction to face criminal proceedings is ... an abuse of process'. In considering this basis, the trial chamber focused on the procedural aspect of the claim.

70. On the basis that the factors that play a role in the determination of each issue were similar, as were the arguments in relation to each (*ibid.*, at para. 106.)

71. As provided for at Art. 9(1) of the International Covenant on Civil and Political Rights (ICCPR) ('Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law') and Art. 5(1) of the European Convention on Human Rights (ECHR) ('Everyone has the right to liberty and security of the person. No one shall be deprived of his liberty save ... in accordance with a procedure prescribed by law ...').

72. See Decision of 9 Oct. 2002, *supra* note 6, at para. 113, and its reference in n. 122 to *Almeida de Quinteros and Quinteros Almeida v. Uruguay*, Communication No. R24/107, Decision of 21 July 1983, *Lopez v. Uruguay*, Communication No. R12/52, Decision of 29 July 1981, *Celiberti de Casariego v. Uruguay*, Communication No. R13/56, Decision of 29 July 1981 and *Canon Garcia v. Ecuador*, CCPR/C/43/D/319/1988.

73. See Decision of 9 Oct. 2002, *supra* note 6, at para. 113.

74. 'The Defence ... submits that since the abduction was unlawful, the exercise of jurisdiction over the individual becomes irregular as well, regardless of whether the abduction was State-sponsored or undertaken by private individuals' (*ibid.*, at para. 108).

75. *Jean-Bosco Barayagwiza v. Prosecutor*, Decision of the International Criminal Tribunal for Rwanda, A. Ch., 3 Nov. 1999.

76. See Decision of 9 Oct. 2002, *supra* note 6, at para. 108, quoting *Barayagwiza*, *supra* note 75, at para. 74.

77. *Ibid.*, para. 114, quoting *Barayagwiza*, *supra* note 75, at para. 73.

78. *Ibid.*, at para. 114.

the particular circumstances of Nikolić's capture did not present an impediment to its exercise of jurisdiction.⁷⁹

Here, the Chamber observes that the assumed facts, although they do raise some concerns, do not at all show that the treatment of the Accused by the unknown individuals amounts [*sic*] was of such an egregious nature.⁸⁰

4. CONCLUSION

Nikolić's lack of success in the motions⁸¹ appears to have been linked in no small way to the decision on the part of the defence counsel to agree to assumed facts and, in particular, to agree that Nikolić's captors in the FRY were 'unknown individuals having no connection with SFOR and/or the Tribunal'.⁸² It is somewhat puzzling that the admission was made in the first place, given that it would be exceedingly unlikely that either Nikolić or his counsel could have had knowledge regarding the presence or absence of such a connection. Moreover, the admission does not appear to be reconcilable with parts 1(ii), (iii), and (iv) of the agreed-upon issues, where the complicity of SFOR, the OTP, and the Tribunal as a whole are called into question.⁸³ Furthermore, the agreement appears to have precluded a *Todorović*-style Plea Agreement with the OTP – at least initially – as disclosure from SFOR was not required in the Motion.

If the accused had claimed that there was a connection between either the OTP or SFOR and the capture, the result on the issue of alleged illegality could well have been different.⁸⁴ In such a case, a discussion would probably have emerged along the lines of that in the *Todorović* case, as to whether the OTP and/or SFOR's conduct could properly be likened to that of the executive authorities of a forum state.⁸⁵ If

79. The trial chamber noted that it 'must undertake a balancing exercise in order to assess all the factors of relevance in the case at hand and in order to conclude whether, in light of all these factors, the Chamber can exercise jurisdiction over the Accused' (*ibid.*, at para. 112). The chamber's starting point in this balancing process, was its earlier conclusion, based on the agreed upon facts, that 'the acts of the unknown individuals, i.e. bringing the Accused against his will from the territory of the FRY into the territory of Bosnia and Herzegovina, cannot be attributed to SFOR or the Prosecution' (*ibid.*, at para. 113).

80. *Ibid.*, at para. 114.

81. On 9 Jan. 2003 the Appeal Chamber of the ICTY, Judge Theodor Meron presiding, dismissed an interlocutory appeal by Nikolić against the Decision. (See Decision on Notice of Appeal, 9 Jan. 2003.) The reasons for the denial of the interlocutory appeal were technical ones, with the majority of the Appeals Chamber finding that the appeal had been brought under the wrong Rule of Procedure and Evidence of the ICTY. Nevertheless, if Nikolić is able to obtain the permission of the trial chamber under Rule 73 for an interlocutory appeal, the matter may yet go to the Appeals Chamber before his trial commences.

82. See Decision of 9 Oct. 2002, *supra* note 6, at para. 21.

83. See *supra* note 30, and accompanying text.

84. See Decision of 9 Oct. 2002, *supra* note 6, at para. 114, where the trial chamber held that:

in a situation where an accused is very seriously mistreated, maybe even subjected to inhuman, cruel or degrading treatment, or torture, before being handed over to the Tribunal, this may constitute a legal impediment to the exercise of jurisdiction over such an accused. *This would certainly be the case where persons acting for SFOR or the Prosecution were involved in such very serious mistreatment.* (emphasis added)

85. See Separate Opinion of Judge Robinson in the Decision on Todorović Motion for Judicial Assistance of 18 Oct. 2000, *supra* note 3, where, at para. 6 and n. 2, he likened the role of SFOR 'to that of a police force in some domestic legal systems', and noted that 'it virtually operates as an enforcement arm of the Tribunal'.

so, the trial chamber's reasoning – that sovereignty had not been breached because of the absence of participation by the forum state in the capture – would no longer apply. Nor would its reasoning that the cases applying the international human rights standards were inapplicable to the *Nikolić* case due to the lack of involvement by the forum state.

The fact that the trial chamber laid great stress on the importance of the OTP's obligations under international human rights standards⁸⁶ may have been its way of limiting the precedent value of the Decision to the strict circumstances of the case – that is, where the defence concedes the absence of connection between the OTP or SFOR and the irregular capture. Moreover, the trial chamber's emphasis on its obligation to ensure due process of law and its endorsement of some of the principles expressed by the national courts following the *male captus, male detentus* approach⁸⁷ – specifically its comment that the prosecution is obliged to come before a trial chamber of the ICTY with 'clean hands'⁸⁸ – might be taken as an indication of how it would rule if the OTP and/or SFOR were implicated in the capture.

5. POSTSCRIPT

After having its original appeal dismissed on 9 January 2003 on procedural grounds, the defendant requested and received certification for leave to appeal from the trial chamber on 20 January 2003. On 5 June 2003 the Appeals Chamber, Judge Theodore Meron presiding, dismissed the defendant's interlocutory appeal.⁸⁹ While space constraints do not permit a discussion of this decision – which was issued after this note had been finalized – its reasoning may be briefly noted. The Appeals Chamber spoke of the need to weigh, on the one hand, the principle of state sovereignty and the fundamental human rights of the accused against society's legitimate expectation that universally condemned offences be brought swiftly to justice, on the other.⁹⁰ The weighing process did not favour the defendant. Moreover, in the view of the Appeals Chamber, in the circumstances, nothing turned on whether or not the conduct of the kidnappers was attributable to SFOR. It ruled that *even assuming that the conduct of the accused's captors should have been attributed to SFOR and that SFOR was responsible for a breach of the human rights of the accused and/or a breach of the sovereignty of the FRY*, there was no basis upon which the Appeals Chamber should decide to refuse to exercise jurisdiction.⁹¹

86. Noting that the norms in the ICCPR and the ECHR 'only provide for the absolute minimum applicable [to the ICTY]'. (See Decision of 9 Oct. 2002, *supra* note 6, at para. 110.)

87. *Ibid.*, at para. 111, where the trial chamber observed: 'In that context, this Chamber concurs with the views expressed in several national judicial decisions, according to which the issue of respect for due process of law encompasses more than merely the duty to ensure a fair trial for the Accused. Due process of law also includes questions such as how the Parties have been conducting themselves in the context of a particular case and how an Accused has been brought into the jurisdiction of the Tribunal.'

88. See Decision of 9 Oct. 2002, *supra* note 6, at para. 111, relying on *Ebrahim*, *supra* note 45.

89. *Prosecutor v. Dragan Nikolić*, Case No. IT-94-2-AR73, Decision on Interlocutory Appeal Concerning Legality of Arrest, A.C., 5 June 2003.

90. *Ibid.*, at paras. 26 and 30.

91. *Ibid.*, at paras. 27 and 33.